

WAIVER
(Sample 208(b)(1)Waiver)

Memorandum

To: Deputy Ethics Counselor

From: Employee' Supervisor

Subject: Conflict of Interest Waiver for [name of employee]

The purpose of this memorandum is to request that you grant [name of employee] a waiver of the criminal conflict of interest provisions that may apply to [his or her] service in an official capacity as [an officer or a member of the board of directors, or other position] of an outside non-profit organization. The need for a waiver is discussed below.

The criminal conflict of interest statute, 18 U.S.C. § 208(a), requires that an employee refrain from participating personally and substantially in an official capacity in any particular matter that will have a direct and predictable effect on the financial interests of any organization in which the individual serves as an officer, director, trustee, or employee.

In the absence of: (1) specific statutory authority placing a federal employee in an officer or director position in an ex officio capacity, (2) a release of fiduciary obligations by the organization (if permitted by state law), or (3) a waiver of the requirements of section 208(a), the conflicts statute effectively would preclude [the employee's service, as an official duty activity, as [officer, director, or other position] of [name of organization]].

[Describe outside position and organization.] [Describe relationship of organization, if any, to Service programs or operations.]

Inasmuch as [the employee's [appointment, election, or selection] as [officer, director, or other position] of [name of organization] is not pursuant to a statute or release of fiduciary obligations, [he or she] has requested that you, as the official to whom waiver authority is delegated, authorize [his or her] participation in certain particular matters that may affect the financial interests of [name of organization]. Under section 208(b)(1), a waiver may be granted if the official to whom waiver authority is delegated determines that the disclosed financial interest is "not so substantial as to be deemed likely to affect the integrity of the employee's services to the Government."

In the course of [his or her] assigned duties as [employee's government title], the following types of particular matters potentially could come before [the employee] for [his or her] personal and substantial participation: (1) particular matters of general applicability, such as legislation, regulation, or policy, that may affect the financial interest of [name of organization] as a member of a class of similarly situated entities; (2) matters that affect one or more of the underlying holdings in the investment portfolio of [name of organization];

(3) particular matters involving specific parties or specific party matters, such as grants, contracts, application approvals, that specifically involve [name of organization] or otherwise affect its financial interest; or (4) other miscellaneous matters involving the conduct of the organization's affairs and Service support.

While performing, as an official duty activity, the usual and customary duties of the position of [an officer or director or another position] of an outside organization, any actions taken, either in the federal workplace or at the organization, that affect the financial interest of the outside organization are deemed official matters to which section 208(a) may apply. For example, such actions may include: (1) requesting that official travel funds be spent or other government resources be utilized for the employee to conduct the affairs of the organization; (2) signing a training authorization to use Service funds to pay for a subordinate to attend a seminar or other meeting of the organization; (3) speaking as an official duty activity, or directing a subordinate to speak, at any seminar or other meeting of the organization where attendance fees are charged; (4) participating as an official duty activity in fund-raising activities of the organization; or (5) providing advice and consultation with respect to, or otherwise conducting, the business affairs of the organization. While the financial impact may be insignificant, under well settled precedent, section 208(a) has no de minimis aspect.

Accordingly, if approved, the requested waiver will apply fully to the employee's participation in an official capacity in any particular matter that will directly and predictably affect the financial interest of [name of organization], EXCEPT the following particular matters, as to which [the employee] [has recused or has committed to recuse]:

[Identify particular matters to which the waiver is NOT intended to apply, e.g., grants to or contracts with the outside organization. In unique circumstances, a waiver might be appropriate for participation in a grant, contract, or other specific party matter. But absent a strong justification, such matters are likely to be standard exceptions to this waiver for which a recusal will be required. If no exceptions are intended, state "No exceptions to this waiver are intended to apply," at this point in the document and describe below the justification in detail.]

I believe that a waiver is justified for the following reasons:

First, because [the employee] would serve in [the outside organization] as an assigned official duty activity, there is a greatly diminished risk that the integrity of the services that the government expects would be affected. [The employee's] position in the outside organization is fully known to the Service. Moreover, the Service already has determined that, to a significant degree, the interests of the Service and the interests of [the organization] are consonant; the Service expects that the interests of the Service and the interests of [the organization] both can be furthered through the performance of the [the employee's] official duties.

Second, most if not all of the particular matters in which [the employee] would participate would not have a significant effect on the financial interests of [the organization]. [If the

employee will have no involvement in any Service grants, contracts or other financial support to the organization--other than the use of government travel or training funds--and will not be involved in regulatory or investigatory matters having a significant financial impact on the organization, state this fact here.]

[If the employee is expected to be involved in more problematic matters that involve funding of the organization or regulatory or investigatory matters that significantly affect the financial interests of the organization, a stronger justification for waiver would be needed.

Such matters can pose a greater risk of a conflict of interest, and consequently the justification for a waiver in such cases would have to be explained in greater detail. Any information bearing on the magnitude of the financial impact (for example, the size of a grant or contract) would be relevant. Also, it may help to discuss any limits on the employee's involvement in the matter (for example, whether the employee is subject to significant supervision or is only involved in a limited aspect of the matter). Moreover, if the matter involved a regulation, policy statement, or other matter of general applicability, this should be noted, as such matters typically are less problematic.¹

The employee understands and agrees that, as an official duty activity, no separate compensation may be received from the outside organization in connection with [his or her] service as its [officer, director or other position].

[State any other facts, commitments, terms, or conditions relevant to the appointing official's assessment of the request.]

DECISION:

_____ Waiver granted, subject to the terms and conditions stated above, based on my determination, made in accordance with 18 U.S.C. §208(b)(1), that the disclosed financial interests are not so substantial as to be deemed likely to affect the integrity of the service which the government may expect from the employee.

Waiver denied.

Deputy Ethics Counselor	Date
U.S. Fish and Wildlife Service	

Confirmed and Acknowledged:

[Name of employee] _____ Date _____